No. 94 172 JUL 27 1994

In the Supreme Court of the United States

OCTOBER TERM, 1993

JOHN BRUCE HUBBARD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. WHETHER CERTIORARI REVIEW IS WARRANTED TO RESOLVE THE SPLIT AMONG THE CIRCUITS REGARDING WHETHER TITLE 18 U.S.C. SECTION 1001 IS SUBJECT TO A "JUDICIAL FUNCTION" EXCEPTION OR AN "EXCULPATORY NO" EXCEPTION.

2. WHETHER IN FINDING UPON DIRECT APPEAL THAT THE PETITIONER'S COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE, THE COURT OF APPEALS SHOULD HAVE AFFORDED THE PETITIONER THE OPPORTUNITY TO PROVE PREJUDICE IN THE DISTRICT COURT PURSUANT TO 28 U.S.C. § 2255 RATHER THAN AFFIRM HIS CONVICTIONS ON THE BASIS THAT NO PREJUDICE COULD BE PROVEN.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 16 F.3d 694. A copy of the opinion is attached to this petition in the Appendix as App. 1-19. The Sixth Circuit denied rehearing on March 30, 1994. A copy of the order of denial is attached to the petition as App. 20.

JURISDICTION

The opinion of the United States Court of Appeals for the Sixth Circuit was filed on February 15, 1994. (App. 1-19). The Sixth Circuit denied rehearing on March 30, 1994. (App. 20). A timely filed application for extension of time for filing this petition for writ of certiorari was granted to July 28, 1994. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment VI provides:

> In all criminal prosecutions, the accused shall ... have the Assistance of Counsel for his defence.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 1001 provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

STATEMENT OF THE CASE

A. Procedural History

The petitioner was charged in a ten-count indictment with four counts of bankruptcy fraud in violation of 18 U.S.C. § 152, with three counts of making false statements in a matter within the jurisdiction of the federal government in violation of 18 U.S.C. § 1001, and with three counts of mail fraud in violation of 18 U.S.C. § 1341. A jury found him guilty on all counts. In addition to a term of incarceration, the petitioner was assessed consecutive fines on each count. On appeal to the Sixth Circuit, the petitioner challenged the sufficiency of the evidence on all counts. Alternatively, the petitioner sought a new trial because he was afforded ineffective assistance of trial counsel in violation of the Sixth Amendment.

In a split decision, the United States Court of Appeals for the Sixth Circuit affirmed. (App. 1-19). Rehearing was denied on March 30, 1994. (App. 20).

B. Statement of the Facts

The petitioner was convicted of three counts of violating 18 U.S.C. § 1001 for falsely (1) stating in response to a bankruptcy trustee's motion to compel the petitioner to surrender his books and records that he had produced such records to the previous bankruptcy trustee; (2) answering a bankruptcy trustee's complaint with a denial; and (3) answering with a denial an additional allegation of the trustee. None of these alleged falsehoods was made under oath.

The petitioner contended that his convictions on these counts could not stand for several reasons including the following: the statements fell within the "exculpatory no" exception to liability under § 1001; and the statements fell

within the "judicial function" exception to § 1001 liability.

The court of appeals rejected the petitioner's "exculpatory no" argument on the ground that the Sixth Circuit had declined to adopt the doctrine in *United States v. Steele*, 933 F.2d 1313, 1319 (6th Cir.) (en banc), *cert. denied*, ___ U.S. ___, 112 S.Ct. 303 (1991).

The court of appeals also refused to adopt the judicial function exception reasoning as follows:

> First, the Supreme Court in [*United States v.*] *Bramblett*, [348 U.S. 503 (1955)] said that § 1001 was to be read broadly and never indicated that there might be such a thing as a judicial function exception. Second, we agree with the [*United States v.*] *Poindexter*[, 951 F.2d 369 (D.C.Cir.1991), *cert. denied*, ___ U.S. ___, 113 S.Ct. 656 (1992)] court [footnote reference omitted] that the judicial function exception does not rest on solid legal ground. Third, if we were to believe a limitation should be placed on § 1001 so that it did not overlap the purpose and scope of the federal perjury statute, this would not be the case in which to do it; none of the false statements here was made under oath and therefore none could be prosecuted as perjury. Finally, we read the Court's footnote in [*United States v.*] *Rodgers*[, 466 U.S. 475, 483 n.4 (1984)] as cautioning against an automatic acceptance of the validity of the judicial function exception; we will instead wait for the Supreme Court to tell us there is such an exception before approving it for use in this Circuit.

(App. 13).

Judge Nelson dissented from this reasoning based upon *United States v. Erhardt*, 381 F.2d 173 (6th Cir.1967) and its underpinning, *Morgan v. United States*, 309 F.2d 234

(D.C.Cir. 1962), *cert. denied*, 373 U.S. 917 (1963). Judge Nelson relied upon the following passage quoted from *Morgan* in *Erhardt*:

> "We are certain that neither Congress nor the Supreme Court intended the statute to include traditional trial tactics within the statutory terms 'conceals or covers up.' We hold only, on the authority of the Supreme Court construction, that the statute does apply to the type of action * * * which essentially involved the 'administrative' or 'housekeeping' functions, not the 'judicial' machinery of the court."

(App. 18-19). From this precedent, Judge Nelson reasoned as follows:

> If the introduction of false documents in court proceedings is conduct connected with the operation of the court's judicial machinery, and not with the performance of an administrative or housekeeping function, I can see no principled basis for concluding that the making of unsworn false statements in court proceedings is not likewise connected with the operation of the judicial machinery. Accordingly, I respectfully dissent from the affirmance of defendant Hubbard's conviction on the false statement counts of the indictment.

(App. 19).

The petitioner also challenged on direct appeal all of his convictions based upon the ineffectiveness of his trial counsel. The court of appeals agreed that petitioner's trial counsel was so incompetent that the petitioner satisfied the so-called "deficiency prong" of the two-pronged test for ineffectiveness of counsel set forth by this Court in *Strickland v. Washington*, 466 U.S. 668 (1984). However, the court of appeals concluded, based solely upon the transcript

of the trial, that the petitioner could not satisfy the "prejudice prong" of *Strickland* because the petitioner "cannot show that his resulting convictions are unreliable or constitutionally defective. Because there is no reasonable probability that but for his counsel's errors the result of his case would have been different, we reject his ineffective assistance of counsel claim." (App. 17).

The petitioner sought rehearing on the ground that a determination whether trial counsel's incompetence resulted in prejudice required an evidentiary hearing. (App. 22-23). The petitioner requested leave to file a motion to vacate pursuant to 28 U.S.C. § 2255 in order to prove that he was prejudiced by the ineffectiveness found by the court of appeals. The court of appeals denied the petition for rehearing. (App. 20).

REASONS FOR GRANTING THE WRIT

I.

The courts of appeals are split over two issues presented in this case: (1) whether the "exculpatory no" doctrine applies to 18 U.S.C. § 1001; and (2) whether there is a "judicial function exception" to § 1001. Determination of the second issue was expressly left open by this Court in *United States v. Rodgers*, 466 U.S. at 483. This Court is asked to resolve the split in the circuits and to address the question left unanswered in *Rodgers*.

II.

On direct appeal, the court of appeals ruled that the petitioner's trial counsel was incompetent. Nevertheless, the court affirmed the petitioner's convictions finding no prejudice. The petitioner was wrongfully denied leave to prove prejudice at an evidentiary hearing pursuant to 28 U.S.C. § 2255.

An accused whose trial counsel is found ineffective in violation of the Sixth Amendment should be afforded an evidentiary hearing to demonstrate prejudice. A determination that counsel's incompetence did not prejudice the accused should not be reached by a court of appeals based solely upon review of the transcript of the trial. It is often what incompetent counsel failed to do which prejudices the defendant. A trial transcript will not reflect such inadequacies, particularly deficiencies in pretrial investigation and discovery, which were apparent here.

Certiorari review is requested to clarify the burden of an accused under *Strickland v. Washington*, *supra*, and the relationship between direct appeal and 28 U.S.C. § 2255 in the context of effective assistance of counsel issues.

ARGUMENT

I.

CERTIORARI REVIEW IS WARRANTED TO RESOLVE THE SPLIT AMONG THE CIRCUITS REGARDING WHETHER TITLE 18 U.S.C. SECTION 1001 IS SUBJECT TO A "JUDICIAL FUNCTION" EXCEPTION OR AN "EXCULPATORY NO" EXCEPTION.

A.

The so-called "judicial function" exception renders 18 U.S.C. § 1001 inapplicable to conduct occurring before a court acting in its judicial capacity. The exception is generally traced to the decision of the District of Columbia Circuit in *Morgan v. United States*, *supra*. The exception has received wide approval. See *United States v. Deffenbaugh Industries, Inc.*, 957 F.2d 749 (10th Cir.1992); *United States v. Masterpol*, 940 F.2d 760, 766 (2d Cir.1991); *United States v. Holmes*, 840 F.2d 246, 248-49 (4th Cir.), *cert. denied*, 488 U.S. 831, 109 S.Ct. 87, 102 L.Ed.2d 63 (1988); *United States v. Lawson*, 809 F.2d 1514, 1519 (11th Cir.1987); *United States v. Mayer*, 775 F.2d 1387 (9th Cir.1985); *United States v. Abrahams*, 604 F.2d 386, 393 (5th Cir.1979); *United States v. D'Amato*, 507 F.2d 26 (2d Cir.1974).

Based upon footnote 4 of *United States v. Rodgers*, 466 U.S. at 483 n.4, wherein this Court recognized this line of authority but expressed "no opinion on the validity of this line of cases", the court of appeals in the case at bar declined to apply the judicial function exception to the petitioner's case. "[W]e will instead wait for the Supreme Court to tell us there is such an exception before approving it for use in this Circuit." (App. 13).

The petitioner respectfully requests that this Court resolve the split among the circuits and answer the request of the Sixth Circuit for guidance.

The instant case is also worthy of review to resolve the related question whether § 1001 warrants the punishment of "traditional trial tactics". *Morgan v. United States*, *supra*. The pleadings which were condemned in the petitioner's indictment are of the type which have been filed since the dawn of "denials" in civil litigation. Historically, such denials are mandatory if the respondent seeks to place a claim at issue. Pursuant to the holding below, attorneys and their clients can face criminal sanctions for such denials entered in response to complaints filed in civil judicial proceedings.

The courts have other means at their disposal for ferreting out or protecting themselves from inaccurate or false denials. See *e.g.*, 18 U.S.C. §§ 401 (contempt), 1501 et seq. (obstruction of justice), 1621 (perjury), 1622 (subornation of perjury), 1623 (false declarations before a court or grand jury), as well as bar proceedings. No useful purpose is advanced by further burdening the already overburdened courts with a requirement that counsel investigate the "truthfulness" of clients' mere denials. By holding the sword of § 1001 over the heads of all counsel and litigants in every federal civil proceeding where denials and admissions have traditionally been freely entered with an eye toward later adjudicating the merits, the Government will not only "inhibit vigorous advocacy of parties' interests", *Mayer*, 775 F.2d at 1389, it will bring a halt to a long-standing procedural means through which litigants have successfully resolved their differences.

In order to resolve the split among the circuits and for the additional reasons stated above, the petitioner requests issuance of the writ of certiorari.

B.

The "exculpatory no" exception to § 1001 prosecutions, in its most general terms, stands for the proposition that mere negative responses to government inquiries do not constitute "statements" within the meaning of § 1001. The doctrine has never been considered by this Court. Seven circuits have adopted the exception in one form or another. *United States v. Taylor*, 907 F.2d 801 (8th Cir.1990), *United States v. Medina de Perez*, 799 F.2d 540 (9th Cir.1986); *United States v. Cogdell*, 844 F.2d 179 (4th Cir.1988); *United States v. Tabor*, 788 F.2d 714 (11th Cir.1986); *United States v. Fitzgibbon*, 619 F.2d 874 (10th Cir.1980); *United States v. King*, 613 F.2d 670 (7th Cir.1980); *United Sates v. Chevoor*, 526 F.2d 178 (1st Cir.1975), *cert. denied*, 425 U.S. 935 (1976). Some circuits have neither adopted nor rejected the exception. *United States v. Barr*, 963 F.2d 641 (3d Cir.), *cert. denied*, ___ U.S. ___, 113 S.Ct. 811 (1992); *United States v. White*, 887 F.2d 267 (D.C.Cir.1989); *United States v. Capo*, 791 F.2d 1054 (2d Cir.1986), *vacated on other grounds*, 817 F.2d 947 (2d Cir.1987). Two circuits have rejected the exception, the Fifth Circuit in *United States v. Rodriguez-Rios*, 14 F.3d 1040 (5th Cir.1994)(en banc), and the Sixth Circuit in the case at bar, adhering to its decision in *United States v. Steele*, *supra*.

This case is appropriate for review to resolve the split among the circuits.

II.

IN FINDING UPON DIRECT APPEAL THAT THE PETITIONER'S COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE, THE COURT OF APPEALS SHOULD HAVE AFFORDED THE PETITIONER THE OPPORTUNITY TO PROVE PREJUDICE IN THE DISTRICT COURT PURSUANT TO 28 U.S.C. § 2255 RATHER THAN AFFIRM HIS CONVICTIONS ON THE BASIS THAT NO PREJUDICE COULD BE PROVEN.

The sixth amendment to the Constitution of the United States guarantees to all accused the right to effective assistance of counsel. *Strickland v. Washington*, *supra*. In order to set aside a conviction based upon ineffective assistance of counsel, a defendant must meet the *Strickland* standard which is as follows:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland, 466 U.S. at 687. Although the second "showing" or "prong" of the *Strickland* test is often referred to as the "prejudice" prong, a defendant need not prove that the verdict would have been different had he been afforded competent counsel. Rather, the issue is whether "there is a reasonable probability that, but for counsel's unprofessional

errors, the result of the proceeding would have been different." 104 S.Ct. at 2068. A defendant is not required to show that but for counsel's errors, the outcome of the proceeding would more likely than not have been different. As this Court held: "[A] reasonably probability is a probability sufficient to undermine confidence in the outcome." *Id.* (emphasis added).

The petitioner raised the ineffective assistance of counsel claim for the first time on direct appeal. The proof on the face of the record on appeal that counsel's performance was deficient was compelling. Indeed, the court of appeals agreed that the record proved the petitioner's trial counsel was incompetent. For example, after the jury returned its verdicts of guilt, the petitioner's trial counsel signed a statement (which was filed in the district court in support of the defendant's application for bail pending appeal and filed in the court of appeals upon review of the district court's denial of bail which this court reversed) which recounted the following:

1. I [David H. Raaflaub] am a sole practitioner with law offices at 400 West Washington Street, Suite 7, Ann Arbor, Michigan 48103.

2. I was trial counsel for the defendant in United States v. John Bruce Hubbard, United States District Court, Eastern District of Michigan, Southern Division, Criminal No. 89-80747.

3. The trial was the first federal jury trial in which I was counsel for a party.

4. I had no prior experience in criminal federal litigation.

5. I did not review all of the discovery made available

by the Office of the United States Attorney.

6. I did not interview all of the potential defense witnesses.

7. I failed to object to various comments made and procedures undertaken by the presiding judge.

8. I believe that the defendant was afforded ineffective assistance of counsel.

(App. 27). In addition to the foregoing, the petitioner established that from the outset of his case, trial counsel failed to perform the most rudimentary of constitutional obligations in defense of the accusations. Counsel's deficiencies rendered indisputable the conclusion that he "was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland, supra*. For these reasons, the court of appeals ruled that the first prong of *Strickland* was satisfied.

With regard to the second or "prejudice prong" of *Strickland*, the petitioner sought reversal on direct appeal on the basis that in a case such as this, where the gross incompetence of counsel was evident prior to trial, thereby presumptively tainting the defense as well as plea negotiations, and where during trial defense counsel's ignorance of the law and facts was so extraordinary that it was the repeated subject of admonishments from the district judge, prejudice should have been presumed. The petitioner argued that just as there is a *per se* violation of the right to assistance of counsel where the accused is represented by someone who (unbeknownst to the defendant) is not a lawyer, see *Solina v. United States*, 709 F.2d 160, 167-69 (2d Cir.1983), there is no less a *per se* violation where the accused is represented by counsel who is as ill-equipped as a non-lawyer. Put another way, the petitioner in this case was afforded, at best, no counsel at all. The petitioner contended that he should not be

held to a standard of proving prejudice where the lack or absence of any meaningful representation at all was at the heart of his complaint.

In the alternative, the petitioner argued that the record on appeal supported his claim of ineffectiveness under the *Strickland* standard for prejudice because the representation afforded "undermined confidence" in the outcome of the proceedings. Trial counsel's own affidavit of incompetence offered strong support for a lack of confidence in the outcome of the trial. Additionally, the evidence of the petitioner's guilt was hardly overwhelming as evidenced by his attack on appeal upon the sufficiency of the evidence to support each of his convictions. Moreover, available defenses, even those apparent on the face of the indictment, were not presented by petitioner's trial counsel. The lack of competent counsel also effectively negated any possibility of plea negotiations in a case which appeared to be a prime candidate for resolution without incarceration.

The court of appeals declined to find prejudice on direct appeal. However, rather than affirm without prejudice to the petitioner's right to raise the issue before the district court, the court of appeals expressly ruled that the petitioner could not prove prejudice.

The petitioner should have been afforded an evidentiary hearing to prove prejudice. Traditionally, the courts of appeals will not entertain claims of ineffective assistance of counsel on direct appeal, holding that these claims should first be presented to the trial court pursuant to 28 U.S.C. § 2255. "In general, a claim of ineffective assistance of counsel cannot be determined on direct appeal when it was not raised in the district court; in such a case there has been no opportunity to develop evidence in the record bearing on the merits of the claim." *United States v. Rinard*, 956 F.2d 85, 87 (5th Cir.1992).

However, in the case at bar, the court of appeals, without the benefit of an evidentiary hearing on the issue, without first affording the district court the opportunity to pass upon the question, and based solely upon the transcript of the petitioner's trial wherein he was represented by incompetent counsel, determined that the petitioner was not prejudiced. It is questionable whether lack of prejudice can ever be gleaned from the transcript of a trial conducted by incompetent defense counsel because such a transcript would not reflect that which defense counsel had failed to do on behalf of the accused.

For these reasons, the decision below is worthy of review by this Court.

CONCLUSION

For the foregoing reasons, the petitioner respectfully requests that the petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit be granted.

Respectfully submitted,

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DATED: July 1994.

APPENDIX

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RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

ELECTRONIC CITATION: 1994 FED App. 0050P (6th Cir.)
File Name: 94a0050p.06

No. 91-1775

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JOHN BRUCE HUBBARD,
Defendant-Appellant.

ON APPEAL from the United States District Court for the Eastern District of Michigan

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Decided and Filed February 15, 1994

Before: NELSON and BATCHELDER, Circuit Judges; and MATIA, District Judge.*

BATCHELDER, Circuit Judge, delivered the opinion of the court, in which MATIA, District Judge, joined. NELSON, Circuit Judge (pp. 18-19), delivered a separate opinion concurring in part and dissenting in part.

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*The Honorable Paul R. Matia, United States District Judge for the Northern District of Ohio, sitting by designation.

ALICE M. BATCHELDER, Circuit Judge. Defendant Hubbard was charged in a ten-count indictment with four counts of bankruptcy fraud in violation of 18 U.S.C. § 152, with three counts of making false statements in a matter within the jurisdiction of the federal government in violation of 18 U.S.C. § 1001, and with three counts of mail fraud in violation of 18 U.S.C. § 1341. A jury found him guilty on all counts. He appeals, arguing (1) the evidence was insufficient to convict him of any and all counts and (2) his trial counsel's performance violated his Sixth Amendment right to the effective assistance of counsel.

I

The counts of conviction revolve around Hubbard's dealings in two different matters: his bankruptcy proceedings and his ownership of a Fino boat.

On September 25, 1985, Hubbard filed a petition for Chapter 7 bankruptcy. Pursuant to the bankruptcy petition and in the course of certain adversary proceedings, Hubbard was deposed on at least four occasions regarding his assets, his transfer of those assets, their value, and their whereabouts. At each of these depositions, Hubbard was put under oath and he swore to tell the truth. The government prosecuted Hubbard for false statements he made during these depositions.

Also during the bankruptcy proceedings, the bankruptcy trustee filed a motion for surrender of the books and records of Hubbard's businesses. Hubbard filed a written response to this motion. The bankruptcy trustee also filed an amended complaint, to which Hubbard responded with a formal pleading, "Debtor's Answer to Trustee's First Amended Complaint." The government prosecuted

Hubbard for written statements he made in his response to the motion and in his Answer.[1]

II

A. Sufficiency of the Evidence

We review the sufficiency of the evidence for a criminal conviction under the standard set out in *Jackson v. Virginia*, 443 U.S. 307, 319 (1979): "[W]hether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."

1. Bankruptcy Fraud Counts (Counts I-IV)

The indictment charged in each of the first four counts that many of Hubbard's answers during his deposition were false: count I alleged that Hubbard gave false answers in response to eleven specified deposition questions on October 23, 1985, count II alleged that Hubbard gave false answers in response to three specified deposition questions on November 13, 1985, count III alleged that Hubbard gave false answers in response to eleven specified deposition questions on February 7, 1986, and count IV alleged that Hubbard gave false answers in response to eighteen specified deposition questions on June 17, 1986. Hubbard asserts that the answers he gave during his depositions were not materially false. Because this is a sufficiency of the evidence claim, if we find that any one of Hubbard's allegedly false statements was a violation of 18 U.S.C. § 152, that count of conviction must be upheld.

We have carefully reviewed the questions asked and the statements given and have concluded that it would serve no useful purpose to go into detail on each and every count of conviction. The evidence was plainly sufficient to support

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[1]We defer discussion of the Fino boat to the analysis of the mail fraud counts (the related counts of conviction).

the jury's conclusions, and we therefore affirm the first four counts of conviction.

2. False Statement Counts (Counts V-VII)

Counts V, VI, and VII charged Hubbard with violating 18 U.S.C. § 1001 for (1) stating in response to the bankruptcy trustee's motion to compel Hubbard to surrender his books and records that he had produced such records previously to the previous bankruptcy trustee (which he had not), (2) answering the bankruptcy trustee's complaint by denying that a certain well-drilling machine was stored a particular place when in fact Hubbard knew that it was, and (3) falsely denying the bankruptcy trustee's further allegation that parts to the well-drilling machine were being stored at a different specified location. None of these alleged falsehoods was made under oath.

Hubbard contends that his conviction on these counts cannot stand for several reasons. First, his untruthful statements were trivial falsehoods and were thus not material as required by § 1001.[2] Second, his statements fall within the "exculpatory 'no'" exception to liability under § 1001. Third, the statements fall within the "judicial function" exception to § 1001 liability. Finally, the plain language of the statute does not encompass this activity.[3]

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[2]Hubbard also argues that his statements were not shown to have the capability of influencing the functions of a government agency, but this is part and parcel of the materiality inquiry, *see United States v. Steele*, 933 F.2d 1313, 1319 (6th Cir.) (en banc), *cert. denied*, 112 S. Ct. 303 (1991), so we do not address this argument independently.

[3]Hubbard's brief can also be read to suggest two additional arguments: (1) that his responses were simply "traditional trial tactics" and thus cannot violate § 1001, and (2) that evidence was taken from his attorney in violation of the attorney-client privilege.

Both of these arguments fail. First, whether or not it is a "traditional trial tactic" to answer a complaint with affirmative falsehoods, we need not sanction such action and therefore will not

As a preliminary matter, we must address an argument that the government raised at oral argument: because Hubbard failed to raise the judicial function exception defense before trial, Federal Rule of Criminal Procedure 12(f) bars him from raising it now. We disagree with the government's suggestion. Rule 12(b) identifies five types of defensive moves (motions, requests, or defenses) that must be made prior to trial, and Rule 12(f) provides that the failure to raise one of these types of claims before trial waives that claim. Hubbard's argument is most closely described by Rule 12(b)(2), which requires that the defendant raise before trial "[d]efenses and objections based on defects in the indictment or information (other than that it fails to show jurisdiction in the court or to charge an offense which objections shall be noticed by the court at any time during the pendency of the proceedings)."

Hubbard's argument is not merely a formalistic objection to a defect in the indictment; instead, his argument goes to the heart of whether, as a matter of law, he can be convicted of the crime with which he was charged. Thus, his claim falls within Rule 12(b)(2)'s parenthetical, which excepts his argument from the waiver provisions of Rule 12. *Cf. Davis v. United States*, 411 U.S. 233, 241 (1973) ("The waiver provisions of Rule 12(b)(2) are operative only with respect to claims of defects in the institution of criminal proceedings."). We therefore proceed to the merits of Hubbard's contentions.

Hubbard's first two arguments can be disposed of quickly. First, his misrepresentations were clearly material under the standard set out in *United States v. Steele*, 933 F.2d 1313, 1319 (6th Cir.) (en banc), *cert. denied*, 112 S.

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create an exception so broad as to include Hubbard's conduct. *Cf.* discussion *infra* note 5. Second, the information elicited from Hubbard's attorney was not protected by the attorney-client privilege because what Hubbard communicated to his attorney was to be conveyed to the bankruptcy trustee and the court via written pleading and thus was not protected by the privilege: the privilege extends only to *confidential* communications, not *all* communications.

Ct. 303 (1991), because they had the capability of influencing the bankruptcy court's function in determining what assets the debtor had and where those assets were so that they could be made available for the repayment of creditors. Second, the "exculpatory 'no'" doctrine cannot be applied here because this Circuit has rejected that doctrine. *See Steele*, 933 F.2d at 1319-22.

Hubbard's third and fourth arguments are similar to one another and challenge his false statement convictions as unlawful as a matter of law even assuming his statements were materially false. This assignment of error poses a more difficult problem.

Section 1001 provides:

> Whoever, *in any matter within the jurisdiction of any department or agency of the United States* knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1001 (emphasis added). The question is whether statements made in written filings in the bankruptcy court (and intended for use by the court and the bankruptcy trustee) are statements made "in [a] matter within the jurisdiction of any department or agency of the United States."[4]

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[4] At first glance, one might be tempted to believe that the plain language of the statute prohibits application of § 1001 to the case at bar. In terms of ordinary usage, "department" and "agency" connote the divisions of the executive branch, e.g., the Treasury Department, the Department of Justice, the Environmental Protection Agency, etc., and not the whole or any divisions of the judicial or legislative branches--Congress is not the Department of Lawmaking, nor is the

In *United States v. Bramblett*, 348 U.S. 503 (1955), a case involving a false representation by a then Congressman to the House of Representatives' Disbursing Office that a named woman was entitled to compensation as his official clerk, the Court rejected the argument that § 1001 violations were limited to false statements made to the executive branch.

> The falsification here involved was held to be within the jurisdiction of the Disbursing Office of the House which it was thought could not meet the definitions in § 6 [*see* note 4 *supra*]. It seemed significant to the trial court "that Title 18, § 287 (formerly the first part of old Section 35) provides penalties against any one who 'makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim . . . knowing such claim to be false,'" whereas § 1001 does not contain such language. [*United States v. Bramblett*, 120 F. Supp. 857, 861 (D.D.C. 1954)].

U.S. Court of Appeals the Appellate Adjudication Agency. And, the statutory definitions section of Title 18 seems to support this common sense view.

> As used in this title:
>
> The term "department" means one of the executive departments enumerated in section 1 of Title 5, unless the context shows that such term was intended to describe the executive, legislative, or judicial branches of the government.
>
> The term "agency" includes any department, independent establishment, commission, administration, authority, board or bureau of the United States or any corporation in which the United States has a proprietary interest, unless the context shows that such term was intended to be used in a more limited sense.

18 U.S.C. § 6. Enacted in 1948 and unchanged since, § 6 sets up a presumption that the judicial branch is not a department or agency unless the context shows otherwise.

The Supreme Court, however, has instructed us that the "any department or agency" language of § 1001 is not to be restricted by § 6. *See* discussion *infra*.

> It might be argued that the matter here involved was within the jurisdiction of the Treasury Department, as the appellee's misstatements would require the payment of funds from the United States Treasury. Or, viewing this as a matter within the jurisdiction of the Disbursing Office, it might be argued, as the Government does, that that body is an "authority" within the § 6 definition of "agency." We do not rest our decision on either of those interpretations. The context in which this language is used calls for an unrestricted interpretation. This is enforced by its legislative history. It would do violence to the purpose of Congress to limit the section to falsifications made to the executive departments. Congress could not have intended to leave frauds such as this without penalty. The development, scope and purpose of the section shows that "department," as used in this context, was meant to describe the executive, legislative and judicial branches of the Government. The difference between the language of § 287 and that of § 1001 can only be understood in the light of legislative history. That history dispels the possibility of attaching any significance to the difference.

Id. at 509. This language from *Bramblett* makes it necessary to reject Hubbard's plain language argument because the Supreme Court has said that § 1001 includes false statements to the judicial branch.

Even though *Bramblett* does not admit of any exceptions to its sweeping language, the lower courts have carved out more than one. The most important of these for the case at bar is one suggested in this court's decision in *United States v. Erhardt*, 381 F.2d 173 (6th Cir. 1967) (per curiam). In *Erhardt*, it was held that Erhardt did not violate § 1001 when he submitted a false writing and testified falsely at an earlier criminal proceeding against him: "We hold that appellant's conviction under § 1001 must be reversed . . . because § 1001 does not apply to the introduction of false documents as evidence in a criminal proceeding." *Id.* at 175.

The *Erhardt* court relied in part on a statement made in *Morgan v. United States*, 309 F.2d 234 (D.C. Cir. 1962), *cert. denied*, 373 U.S. 917 (1963). In *Morgan*, the court affirmed the § 1001 conviction of a layman who held himself out before the courts as being admitted to practice law: "We hold only, on the authority of the Supreme Court construction [of § 1001 in *Bramblett*], that the statute *does* apply to the type of action with which appellant was charged, action which essentially involved the 'administrative' or 'housekeeping' functions, not the 'judicial' machinery of the court." *Id.* at 237 (emphasis added). The *Erhardt* court relied on the following dictum from *Morgan*: "We are certain that neither Congress nor the Supreme Court intended the statute to include traditional trial tactics within the statutory terms 'conceals or covers up.'" *Id.* Although this language was directed at Morgan's argument that upholding his conviction for misrepresenting his status as an attorney would mean that it would be a § 1001 violation to engage in several traditional trial tactics, *e.g.*, defense counsel's closing argument on behalf of a client he knows to be guilty (as "covering up" the truth of the matter), *see id.*, the *Erhardt* court apparently believed that this statement supported the extension of the "traditional trial tactics" category to include falsified evidence and held that Erhardt's conviction must be reversed.

Relying on *Erhardt* and *Morgan*, several courts developed the "judicial function" exception to § 1001 liability. Some of these courts draw a distinction between a court's judicial functions and its administrative or housekeeping functions, and hold that § 1001 can be violated by false statements made in the administrative matters of the courts, but not the judicial functions of those courts. For example, falsely denying to a bankruptcy judge that one forged a particular bankruptcy document cannot be a violation of § 1001 because it was within the court's *judicial* capacity, *see United States v. Taylor*, 907 F.2d 801, 805 n.3 (8th Cir. 1990) (dictum; court based its decision on the "exculpatory 'no'" doctrine), submitting fictitious letters of recommendation for the district court to

consider at sentencing was within the *judicial* function of the court and could not be a violation of § 1001, *see United States v. Mayer*, 775 F.2d 1387 (9th Cir. 1985), giving a false name to a magistrate judge at a plea hearing was within a matter of the magistrate's *administrative* duties and thus was a violation of § 1001, *see United States v. Plascencia-Orozco*, 768 F.2d 1074 (9th Cir. 1984), false representations on statement of indigency were *administrative* and thus were a proper basis for § 1001 liability, *see United States v. Powell*, 708 F.2d 455 (9th Cir. 1983), *cert. denied*, 467 U.S. 1254 (1984), *and rev'd on other grounds*, 469 U.S. 57 (1984), giving a false name to a magistrate and filing a form consenting to proceed before the magistrate judge under the false name was within an *administrative* matter of the court and therefore subject to § 1001 liability, *see United States v. Holmes*, 840 F.2d 246, 248-49 (4th Cir. 1988), and filing a false performance bond in bankruptcy court was an *administrative* matter and therefore the § 1001 conviction was upheld, *see United States v. Rowland*, 789 F.2d 1169 (5th Cir.), *cert. denied*, 479 U.S. 964 (1986). Other courts have applied the judicial function exception without considering the administrative/judicial dichotomy. *See United States v. Wood*, 6 F.3d 692, 694-95 (10th Cir. 1993) (false statements made to FBI agents acting under auspices of federal grand jury were "made in connection with a judicial proceeding" and were therefore "exempt from prosecution pursuant to the 'judicial function' exception"); *United States v. Deffenbaugh Indus., Inc.*, 957 F.2d 749 (10th Cir. 1992) (false affidavit submitted to the Department of Justice in connection with a grand jury investigation came within judicial function exception to § 1001 liability); *United States v. Abrahams*, 604 F.2d 386, 393 (5th Cir. 1979) (making false statements concerning one's identity to a magistrate judge at a bail hearing could not violate § 1001 because "'§ 1001 is not a proper basis for charging a defendant with making a false statement in a judicial proceeding'" (quoting *Erhardt*); even though false statement was regarding an administrative matter, court relied on judicial function exception anyway). *But see United States v. Barber*, 881 F.2d 345, 349-50 (7th Cir.

1989) (submission of false letters to sentencing judge in another's criminal proceeding violated § 1001; court criticized the "so-called 'trial tactics' exception" and refused to apply it), *cert. denied*, 495 U.S. 922 (1990).[5]

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[5]Worth noting is that the District of Columbia Circuit, which authored *Morgan*, has criticized the other circuits that have relied on the *Morgan* dictum in establishing the judicial function exception:

> A number of courts, relying upon the *Morgan* dictum, have actually held that there is a "judicial function" exception to § 1001. . . .
>
> We are not persuaded to carve out a broad legislative function exception to § 1001 [as the defendant requested]. The *Morgan* dictum and apparently the subsequent opinions of other circuits are grounded primarily upon the concern that the statutory terms "conceals or covers up" not be applied to punish "traditional trial tactics":
>
> > Does a defendant cover up . . . a material fact when he pleads not guilty? Does an attorney cover up when he moves to exclude hearsay testimony he knows to be true, or when he makes a summation on behalf of a client he knows to be guilty?
>
> *Morgan*, 309 F.2d at 237 (internal quotation marks omitted)....
>
> Although some of the other courts of appeals have since expanded upon the *Morgan* dictum, *e.g.*, *Mayer*, 775 F.2d 1387, we have not, and we doubt that the "traditional trial tactics" rationale of that case shields from criminal responsibility a defendant who knowingly makes a material false statement of fact in a judicial proceeding. We see no reason, therefore, to extend the putative "judicial function" exception to protect one who knowingly makes a material false statement of fact in the course of a legislative inquiry. *See Mayer*, 775 F.2d at 1392 (Fairchild, concurring) ("virtually none of the significant decisions has really defined the [judicial function] exception [or] expounded a rationale," and there is no "compelling reason for extending the exception beyond the exact holdings" of prior cases).

United States v. Poindexter, 951 F.2d 369, 387 (D.C. Cir. 1991), *cert. denied*, 113 S. Ct. 656 (1992).

The Supreme Court has added one final wrinkle in this area. It recently cited *Bramblett* with approval and noted that it had not created or yet approved the judicial function exception: "These courts [the ones creating the exception] have held that, although the federal judiciary is a "department or agency" within the meaning of § 1001 with respect to its housekeeping or administrative functions, the judicial proceedings themselves do not qualify. [citing *Abrahams*, *Erhardt*, and *Morgan*]. We express no opinion on the validity of this line of cases." *United States v. Rodgers*, 466 U.S. 475, 483 n.4 (1984).

Of course, we are bound only by our own prior decisions and the decisions of the Supreme Court. Because no Sixth Circuit case has cited *Erhardt* and no Sixth Circuit case (either published or unpublished and available on an electronic database) has discussed the judicial function exception,[6] we are left only with *Bramblett* and *Erhardt* itself for guidance. And *Erhardt*'s foundation has been significantly weakened, if not entirely undercut, by the abolition of the two-witness rule in perjury prosecutions, the vitality of which was a primary concern in *Erhardt*. *See Erhardt*, 381 F.2d at 175 ("A contrary construction [one that permitted § 1001 liability for false testimony in a criminal proceeding] would undermine the effectiveness of the two-witness rule and of the perjury statute itself."). We therefore conclude that it is anything but clear that a judicial function exception is recognized in the law of this Circuit.

We find it unnecessary to reach the government's argument that "the 'judicial function exception' is

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[6]This is true even of *Erhardt* because *Erhardt* preceded the other circuits' development of the judicial function exception, gave as the rationale for its holding the avoidance of undermining the perjury statute, *see* discussion *infra*, and did not purport to be developing any such "judicial function" exception. And although the *Erhardt* court did cite *Morgan*, it cannot be said that *Erhardt* was implicitly adopting the judicial function exception from *Morgan* because (as discussed above) *Morgan* did not create any such exception.

inapplicable to false statements intended to conceal assets from the trustee and creditors for the ultimate purpose of retaining those assets after discharge because the determination and collection of assets constitutes an administrative, and not an adjudicative, function of the bankruptcy court" because we decline to adopt the judicial function exception. First, the Supreme Court in *Bramblett* said that § 1001 was to be read broadly and never indicated that there might be such a thing as a judicial function exception. Second, we agree with the *Poindexter* court, *see supra* note 5, that the judicial function exception does not rest on solid legal ground. Third, if we were to believe a limitation should be placed on § 1001 so that it did not overlap the purpose and scope of the federal perjury statute, this would not be the case in which to do it; none of the false statements here was made under oath and therefore none could be prosecuted as perjury. Finally, we read the Court's footnote in *Rodgers* as cautioning against an automatic acceptance of the validity of the judicial function exception; we will instead wait for the Supreme Court to tell us there is such an exception before approving it for use in this Circuit.

As a final and related ground for reversing his § 1001 convictions, Hubbard suggests that we follow cases such as *United States v. London*, 714 F.2d 1558 (11th Cir. 1983), and *United States v. D'Amato*, 507 F.2d 26 (2d Cir. 1974). We believe both are distinguishable.

In *London* it was held that an attorney who falsified a court order and gave it to his clients in order to defraud them of substantial sums of money did not violate § 1001. The *London* court held that § 1001 was concerned with misrepresentations made *to the government* and that an attorney's fraudulent statement *to his clients*, even though related to ongoing federal civil litigation, was not a violation of § 1001. *London* is most easily distinguished by the fact that the attorney never made any fraudlent statement to the court or to the opposing party in any court document or proceeding. The *London* holding seems sound but is vastly different from the case at bar.

The *D'Amato* case is more similar. In a private civil action for damages arising out of the counterfeiting of Johnson Products's "Ultra Sheen" hair gel, D'Amato filed an affidavit denying knowledge that the products he sold were counterfeits. On appeal following a jury conviction for violation of § 1001, the Second Circuit reversed the conviction, holding that § 1001 does not apply to a false statement made in a private civil action. The court said that § 1001 "does not apply where the Government is involved only by way of a court deciding a matter in which the Government or its agencies are not involved." *D'Amato*, 507 F.2d at 28. The court emphasized the fact that the government's only involvement in the case was as adjudicator of the controversy and noted that in other § 1001 cases the government was often involved as an opposing party as well (e.g., false statements made in criminal cases; government as opposing party). *Id.* at 29.

We believe that *D'Amato* is also distinguishable from the case at bar. Without focusing on the distinguishing features, however, we simply hold that to the extent that *D'Amato* is similar enough to be controlling on this issue were this case being heard in the Second Circuit, we decline to follow it in the Sixth Circuit.

We therefore affirm Hubbard's conviction on counts V, VI, and VII.

3. Mail Fraud Counts (Counts VIII-X)

Since the 1970s, Hubbard's stepfather had owned a Fino boat. After his stepfather died in 1981, Hubbard took the boat from Florida to St. Clair Shores, Michigan. The boat was in "extremely poor" shape at the time, so Hubbard set out to restore the boat, employing the assistance of one Cliff Hammerlee. Hammerlee stripped down the boat, removing most of the equipment from the boat (e.g., seats, decking, gauges, etc.), and stored the equipment at his own home. When Hubbard did not have the money to pay Hammerlee to continue the restoration, Hubbard rented a truck and picked up the equipment.

In April 1985, Hubbard applied to Allstate for insurance on the boat, claiming its value to be $22,500. Although Allstate denied permanent coverage, it did grant temporary coverage through June 3, 1985. On June 3, Hubbard filed a claim with Allstate for an alleged June 2 theft of equipment from the boat. The Allstate claims adjuster took pictures of the boat, Hubbard sent a letter that itemized the replacement cost for the "stolen" equipment to Allstate on July 12, and Allstate paid a claim of approximately $4800. At trial Hammerlee identified the photos taken by the Allstate adjuster as representative of the boat's condition in 1981 just after he had removed all the equipment for Hubbard. These facts (and specifically the July 12th letter) formed the basis for Count VIII.

Also in April 1985, Hubbard applied for a loan to refurbish the boat. With his loan application, he included fraudulent documentation regarding (1) the boat's value, (2) a prior (non-existent) loan, (3) insurance coverage, and (4) the location of the boat. The loan was approved. By mail on July 31, 1985, Hubbard paid a portion of his loan, made fraudulent representations as to the progress of the restoration, and requested a short-term renewal of the loan. In response to Hubbard's request for a short-term renewal, the bank sent loan renewal documentation to Hubbard on August 29, 1985. The July 31 and August 29 mailings formed the basis of Counts IX and X. The jury found Hubbard guilty on all three mail fraud counts.

Hubbard argues that the evidence was insufficient as to each count of mail fraud because the scheme to defraud was "not dependent upon the charged mailings" and because the scheme had reached fruition before the mailings were made.[7]

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[7]Hubbard also argues that his conviction was barred by the statute of limitations. This argument is without merit because the indictment was returned on July 5, 1990, within five years of the charged mailings.

Hubbard's insufficiency contention fails for two reasons: he misunderstands the required nexus between the scheme and the mailing, and he defines the scheme too narrowly. The scheme charged was not simply a scheme to defraud the insurance company, but was also a scheme to obtain by fraudulent means a loan for repairing a boat and to obtain by fraudulent means an extension of that loan. If the mailings made were "'incident to an essential part of the scheme,' or 'a step in [the] plot,'" *Schmuck v. United States*, 489 U.S. 705, 711 (1989) (citation omitted), liability for mail fraud may attach. Here, the submission of fraudulent documents to the insurance company and the submission of false loan information were obviously important steps in Hubbard's scheme. The third mailing was less integral, but nevertheless sufficient. In response to Hubbard's request for renewal of the loan, the bank sent him loan renewal documents in reliance on his prior misrepresentations. Because Hubbard caused the Bank's mailing by requesting the loan extension documents and because those documents were "a step in the plot," the evidence was sufficient to support the third mail fraud count. We therefore affirm his conviction on counts VIII, IX, and X.

B. Ineffective Assistance of Counsel

Finally, Hubbard argues that his trial counsel's deficient performance violated the Sixth Amendment.

Generally, ineffective assistance of counsel allegations will not be addressed on appeal if they have not been raised in the district court. *See United States v. Hill*, 688 F.2d 18 (6th Cir.), *cert. denied*, 459 U.S. 1074 (1982). The exception to this rule is where the record on appeal is adequate to assess the merits of the defendant's allegations. *See United States v. Wunder*, 919 F.2d 34 (6th Cir. 1990). The record here is sufficient to consider this assignment of error, so we may proceed.

In order to show ineffective assistance of counsel, Hubbard must establish two things:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984).

Hubbard makes a persuasive case for the incompetence of his trial counsel and thus can satisfy the deficiency prong. But such deficiency does not require reversal because in light of the evidence against him and the type of errors committed by his counsel, Hubbard cannot satisfy the prejudice prong; he cannot show that his resulting convictions are unreliable or constitutionally defective. Because there is no reasonable probability that but for his counsel's errors the result of his case would have been different, we reject his ineffective assistance of counsel claim.

III

For the foregoing reasons, we AFFIRM the district court's judgment of conviction.

DAVID A. NELSON, Circuit Judge, concurring in part and dissenting in part. Under our circuit-precedent rule, it seems to me that *United States v. Erhardt*, 381 F.2d 173 (6th Cir. 1967), requires us to reverse defendant Hubbard's conviction on the three counts of the indictment (Counts V through VII) that charged him with having made false statements in violation of 18 U.S.C. §1001.

Erhardt involved an indictment with two counts, one of which charged the defendant with perjury (18 U.S.C. §1621) and the other of which charged him with using a false writing in violation of 18 U.S.C. §1001. Only the reversal of the conviction on the §1001 count is directly relevant here.

Erhardt's holding on the §1001 issue was not based primarily on the two-witness rule, as I read the panel's somewhat cryptic opinion. The panel began its discussion of the §1001 issue by saying that "[t]he two-witness rule is not dispositive of appellant's conviction under the count charging the introduction of a false document, since it is generally held that the two-witness rule does not apply to prosecutions under 18 U.S.C. §1001." *Id.* at 175 (citations omitted). It is true that the panel seemed to be talking about its construction of §1001 when it said, at the end of the opinion, that "[a] contrary construction would undermine the effectiveness of the two-witness rule and of the perjury statute itself." *Id.* I do not understand this statement to represent the principal basis for the panel's holding on the §1001 issue, however, given the panel's explicit acknowledgement that the two-witness rule applied only to perjury prosecutions under §1621 and not to false writing prosecutions under §1001.

The principal basis for the holding on the §1001 issue, as I understand it, was the passage from *Morgan v. United States*, 309 F.2d 234, 237 (D.C. Cir. 1962), *cert. denied*, 373 U.S. 917 (1963), quoted by the *Erhardt* panel as follows:

> "We are certain that neither Congress nor the Supreme Court intended the statute to include

traditional trial tactics within the statutory terms 'conceals or covers up.' We hold only, on the authority of the Supreme Court construction, that the statute does apply to the type of action * * * which essentially involved the 'administrative' or 'housekeeping' functions, not the 'judicial' machinery of the court."

In adopting this statement as the basis for its holding that "§1001 does not apply to the introduction of false documents as evidence in a criminal proceeding," the *Erhardt* panel was saying, I believe, that §1001 does not apply to conduct engaged in by the defendant in connection with the operation of a court's "'judicial' machinery," as opposed to the performance of the court's "'administrative' or 'housekeeping' functions."

If the introduction of false documents in court proceedings is conduct connected with the operation of the court's judicial machinery, and not with the performance of an administrative or housekeeping function, I can see no principled basis for concluding that the making of unsworn false statements in court proceedings is not likewise connected with the operation of the judicial machinery. Accordingly, I respectfully dissent from the affirmance of defendant Hubbard's conviction on the false statement counts of the indictment. I concur in the affirmance of the convictions on the remaining counts.

No. 91-1775
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
Filed MAR 30, 1994

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v. ORDER

JOHN BRUCE HUBBARD,

Defendant-Appellant.

BEFORE: NELSON and BATCHELDER, Circuit Judges; and MATIA*, District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Nelson would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT
/s/ LEONARD GREEN, Clerk

* Hon. Paul R. Matia, United States District Judge for the Northern District of Ohio, sitting by designation

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No. 91-1775

UNITED STATES OF AMERICA,

Appellee,

v.

JOHN BRUCE HUBBARD,

Appellant.

_____/

PETITION FOR REHEARING
AND
SUGGESTION FOR REHEARING *EN BANC*

The appellant, through undersigned counsel, respectfully requests that the Court grant rehearing and/or rehearing *en banc* based upon the reasons stated below.

I.

REQUIRED STATEMENT FOR REHEARING *EN BANC*

Counsel for the appellant requests rehearing *en banc* for the following reason:

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decision of the United States Court of Appeals

for the Sixth Circuit and that consideration by the full Court is necessary to secure and maintain uniformity of decisions: *United States v. Erhardt*, 381 F.2d 173 (6th Cir.1967).

II.

REASON FOR GRANTING REHEARING OR CLARIFICATION

The appellant seeks rehearing or clarification of the panel's ruling upon the claim of ineffective assistance of counsel. The panel ruled that the appellant presented "a persuasive case for the incompetence of his trial counsel and thus can satisfy the deficiency prong" of the two-pronged test of *Strickland v. Washington*, 466 U.S. 668 (1984). Slip opinion at 17. However, the panel concluded that the appellant could not meet the prejudice prong because "he cannot show that his resulting convictions are unreliable or constitutionally defective". *Id*. The appellant requests that the Court rehear or clarify this latter conclusion so that it is not read as barring the appellant from proving prejudice in the district court pursuant to 28 U.S.C. § 2255.

The appellant and his appellate counsel are in possession of the names of defense witnesses and voluminous exculpatory documents available to but never considered by appellant's incompetent trial counsel. The appellant seeks the opportunity to prove that his convictions are unreliable because this compelling evidence was not presented at trial due to trial counsel's ineffectiveness. The appellant was unable to present this evidence on appeal for the obvious reason that the evidence was never presented below and was therefore not in the record.

The appropriate vehicle for consideration of this evidence is a motion to vacate pursuant to 28 U.S.C. § 2255. The

panel's affirmance should be read as "without prejudice" to the appellant's right to obtain § 2255 relief upon an appropriate evidentiary showing even though the issue was raised by the appellant on direct appeal. Prudent appellate counsel must raise on direct appeal ineffective assistance claims or risk a finding of waiver. See *Beaulieu v. United States*, 930 F.2d 805, 807 n.2 (10th Cir.1991) and cases cited. Where appellate counsel acts prudently and raises the issue on direct appeal, the appellate court should not, however, adjudicate the issue against the appellant if the appellant might be entitled to relief upon a proper evidentiary showing. *Id*. Rather, the appellant should be free to pursue relief in the district court. In fact, the general rule, as followed by this circuit, see *United States v. Castro*, 908 F.2d 85, 89 (6th Cir.1990), requires that the issue first be presented to the district court. Application of the general rule assists in the determination of "the asserted prejudicial impact on the outcome of the trial." *Beaulieu*, 930 F.2d at 805 (citing *Castro*).

For these reasons, the appellant respectfully requests that the Court grant rehearing or clarification to indicate that the affirmance is without prejudice to the appellant's rights pursuant to 18 U.S.C. § 2255.

III.

REASONS FOR GRANTING REHEARING *EN BANC*

In his dissenting opinion in this case, Judge Nelson concluded that the majority opinion is in conflict with *United States v. Erhardt*, 381 F.2d 173 (6th Cir.1967) and that the correct application of *Erhardt* requires reversal of the appellant's convictions on Counts V through VII. Based upon the conflict between the panel's decision and *Erhardt* and because the panel has effectively overruled its own binding

precedent, the appellant seeks rehearing *en banc*.

In *Erhardt*, this Court reversed a § 1001 conviction where the defendant had submitted false sworn testimony and a false writing in an earlier criminal proceeding against him. This Court reasoned as follows: "We hold that appellant's conviction under § 1001 must be reversed ... because § 1001 does not apply to the introduction of false documents as evidence in a criminal proceeding." *Id*. at 175.

In the case at bar, the appellant was convicted of violating § 1001 for having submitted unsworn false statements in earlier Court proceedings. On appeal, the facts appeared even more compelling for reversal than those presented in *Erhardt* where, by contrast, the false statements were sworn. Nevertheless, the panel declined to apply *Erhardt*, ruling instead that the decision's "foundation has been significantly weakened, if not entirely undercut, by the abolition of the two-witness rule in perjury prosecutions, the vitality of which was a primary concern in *Erhardt*." Slip opinion at 12. In so holding, the panel has rendered an opinion not only in conflict with *Erhardt*, but has effectively overruled *Erhardt*.

In taking issue with the panel's failure to follow *Erhardt*, Judge Nelson concluded that reversal was required "[u]nder our circuit-precedent rule". Slip opinion at 18. Judge Nelson further found that the panel's attack upon the vitality of *Erhardt* was wrong for the following reasons:

> *Erhardt*'s holding on the § 1001 issue was NOT based primarily on the two-witness rule, as I read the panel's somewhat cryptic opinion. The panel [in Erhardt] began its discussion of the § 1001 issue by saying that "[t]he two-witness rule is NOT dispositive of appellant's conviction under the court charging the introduction of a false document, since it is generally held that the two-

witness rule does not apply to prosecutions under 18 U.S.C. § 1001." *Id*. at 175. (emphasis supplied)

Slip opinion at 18. Judge Nelson concluded that the principal basis for this Court's ruling in *Erhardt* on the § 1001 issue was *Morgan v. United States*, 309 F.2d 234, 237 (D.C.Cir.1962), *cert. denied*, 373 U.S. 917 (1963), cited in *Erhardt* for the proposition that § 1001 does not include traditional trial tactics and applies only to the type of action characterized as "administrative" or "housekeeping" functions as opposed to the "judicial" machinery of the court. *Id*. at 19. Continued reliance upon this analysis, Judge Nelson reasoned, compelled reversal for the following reason:

> If the introduction of false documents in court proceedings is conduct connected with the operation of the court's judicial machinery, and not with the performance of an administrative or housekeeping function, I can see no principled basis for concluding that the making of unsworn false statements in court proceedings is not likewise connected with the operation of the judicial machinery.

Id.

Based upon the reasoning of Judge Nelson and in order to maintain uniformity and to preserve the circuit-precedent rule, *en banc* rehearing is sought.

IV.

CONCLUSION

The panel has ruled that the appellant's trial counsel was deficient. Voluminous evidence is available which would satisfy the prejudice prong of the *Strickland* test for an

ineffective assistance of counsel claim. The Court is requested to rule on rehearing that its affirmance was without prejudice to the appellant's rights under 28 U.S.C. § 2255.

Rehearing *en banc* is warranted because the majority has overruled binding Sixth Circuit precedent. Only the *en banc* Court or the Supreme Court can so rule. Due to the violation of the circuit-precedent rule and because the panel decision is in conflict with the binding precedent, *en banc* review is respectfully requested.

WHEREFORE, the appellant respectfully requests that the Court rehear or clarify the ineffective assistance claim with regard to the appellant's right to seek relief under 28 U.S.C. § 2255 and grant rehearing *en banc* to resolve the conflict with *Erhardt* and the Court's circuit-precedent rule.

Respectfully submitted,

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/s/ PAUL MORRIS
Counsel for Appellant

I HEREBY CERTIFY that a copy of the foregoing was mailed to Jenifer Peregord, Assistant United States Attorney, Office of the United States Attorney, 817 Federal Building, Detroit, Michigan 48226 this 28th day of February, 1994.

/s/ PAUL MORRIS

AFFIDAVIT

Before me, the undersigned authority, personally appeared DAVID H. RAAFLAUB, who first being duly sworn, stated the following:

1. I [David H. Raaflaub] am a sole practitioner with law offices at 400 West Washington Street, Suite 7, Ann Arbor, Michigan 48103.
2. I was trial counsel for the defendant in United States v. John Bruce Hubbard, United States District Court, Eastern District of Michigan, Southern Division, Criminal No. 89-80747.
3. The trial was the first federal jury trial in which I was counsel for a party.
4. I had no prior experience in criminal federal litigation.
5. I did not review all of the discovery made available by the Office of the United States Attorney.
6. I did not interview all of the potential defense witnesses.
7. I failed to object to various comments made and procedures undertaken by the presiding judge.
8. I believe that the defendant was afforded ineffective assistance of counsel.

/s/ DAVID H. RAAFLAUB

SWORN TO AND SUBSCRIBED BEFORE ME THE UNDERSIGNED AUTHORITY THIS ___ DAY OF ___, 1991.